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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,
 Plaintiff,
 v.
 GOOGLE INC.,
 Defendant.

Case No. 3:10-cv-03561-WHA

**GOOGLE'S NOTICE OF MOTION AND
 MOTION TO STRIKE PORTIONS OF
 THIRD EXPERT REPORT BY IAIN
 COCKBURN AND EXPERT REPORT BY
 STEVEN SHUGAN; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Dept.: Courtroom 8, 19th Floor
 Judge: Hon. William Alsup

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NOTICE OF MOTION AND MOTION TO STRIKE

PLEASE TAKE NOTICE that Defendant Google Inc. ("Google") hereby moves to exclude portions of the opinions and testimony of Oracle America, Inc.'s ("Oracle") damages experts Dr. Iain M. Cockburn and Dr. Steven Shugan. This Motion is based on the following memorandum of points and authorities in support, the Declaration of David Zimmer ("Zimmer Decl.") and accompanying exhibits, the entire record in this matter, and on such evidence as may be presented at any hearing of this Motion, on a date and at a time to be determined by the Court.

Dated: February 17, 2012

KEKER & VAN NEST LLP

By: s/ Robert A. Van Nest
ROBERT A. VAN NEST
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GOOGLE INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Oracle's damages expert Dr. Iain Cockburn's third attempt to formulate a viable damages report remains riddled with fatal errors. In response to the Court's rejection of his methodology for separating the value of the patents and copyrights at issue in this case from the remainder of the licensing bundle at the heart of the 2006 Sun-Google negotiations, Dr. Cockburn now offers two alternative apportionment methods. Both are legally improper.

First, Dr. Cockburn purports to evaluate the "independent significance" of the patents-in-suit and copyrights to Google, but this "analysis" is smoke and mirrors. Dr. Cockburn throws into the hopper every piece of evidence he can identify showing that Google considered certain obvious features—speed, memory, and number of applications—important to a smartphone platform and that the inventions at issue improve those features. Based on this evidence as a whole, and without using any quantitative algorithm or formula, Dr. Cockburn simply concludes that the asserted patents are worth "at least" an even 25% of the total bundle, and the copyrights worth exactly half that much. This is a subjective guess, not an objective methodology; it is not replicable by anyone other than Dr. Cockburn. Indeed, Dr. Cockburn's "at least" 25% conclusion effectively tries to resurrect the "25 percent rule" that the Federal Circuit struck down just last year in *Uniloc*. Further, Dr. Cockburn admitted at deposition that he included the caveat "at least" to preserve his flexibility to argue a much higher percentage to the jury. He flatly stated that, having calculated the total value of the licensing bundle to be \$597.5 million, he might tell the jury that the patents were worth *at least 50%* of that total—and that the copyrights might be so important to Android that they could be worth *100%* of the bundle. This is as unformed and speculative as expert testimony can get. It cannot possibly assist the jury.

Second, Dr. Cockburn's alternative apportionment methodology—the "group and value" approach—asked a group of five Oracle engineers to identify all the mobile Java-related patents in Sun's 2006 portfolio, separate those patents into categories, rank the categories in importance, and then rate each patent's value on a three-point scale. Four of the five Oracle engineers involved in this process conducted infringement analyses of the patents-in-suit in preparation for

1 this lawsuit, and admitted in deposition that they spent next to no time compiling their rankings
2 and were influenced by their prior work on this case. Further, the engineers did no quantitative
3 testing to confirm their conclusions, and Mark Reinhold, the Oracle engineer who headed up the
4 team, admitted there was no way to translate the engineers' judgment of comparative value into
5 the hard numbers required for a damages analysis. Dr. Cockburn tries to paper over this gap
6 with three studies finding that, in general, a small percentage of issued patents account for a large
7 percentage of the aggregate value of all patents. But none of these studies looked at a single
8 company's patent portfolio in a narrow technology area, such as Sun's mobile Java portfolio, and
9 two of the three studies evaluated European patents, not U.S. patents. The studies are Dr.
10 Cockburn's sole basis for concluding that the top 22 patents in the Sun portfolio account for up
11 to 92% of the total value of the portfolio. With three of the patents-in-suit—the '104, '205, and
12 '720—placed among the top 22 by the very engineers who selected litigation patents at the
13 outset, Dr. Cockburn calculates the value of the six patents-in-suit as falling in the broad range
14 between 10.2% and 32.7% of the \$597.5 million bundle. Dr. Cockburn has no reasonable basis
15 for this conclusion. His group and value approach also should be stricken.

16 Dr. Cockburn's newest opinion has other disqualifying flaws as well. His apportionment
17 analysis as to the copyrights at issue fails because he did not value any of the copyrighted
18 material included in the Sun-Google negotiations other than the remaining 37 API specifications
19 on which Oracle bases its copyright claim. Dr. Reinhold confirmed at his deposition that Sun
20 and Google were negotiating for a partnership including a license to *all* of Sun's mobile Java
21 related copyrights—among other things, the source code implementing the Java virtual machine
22 and all of the class libraries associated with the APIs. Yet Dr. Cockburn still has no idea what
23 was included in that universe of copyrights, and made no effort to value any of the other
24 copyrights besides the APIs. Instead, he simply assumed that the *value* of that *presently existing*
25 Sun intellectual property was subsumed into the *projected cost* of *future* Sun engineering
26 expenses to be incurred during a Sun-Google partnership. There is no economic basis for using
27 projected future engineering costs as a proxy for fair market value of copyrighted works.

28 Moreover, despite repeated orders from this Court instructing him to do so, Dr. Cockburn

1 still refuses to value the patents on a claim-by-claim basis. This is particularly important here,
 2 where Oracle initially sued Google on 132 patent claims. Presumably Oracle had a Rule 11 basis
 3 for asserting all those claims, so all of them must have some value (even leaving aside the
 4 potentially valuable other claims of those patents that Oracle never asserted). Yet Dr. Cockburn
 5 never separated out the value of the unasserted—or asserted but abandoned—claims, nor did he
 6 deduct the value of the unasserted claims from the value of the patents-in-suit as a whole.

7 Finally, Dr. Cockburn also relies on his own econometric study and a “conjoint” analysis
 8 conducted by another Oracle expert, Dr. Steven Shugan. Both of these analyses are based on
 9 unrealistic assumptions and suffer from serious methodological flaws. They should be stricken.
 10 And, because Dr. Cockburn’s “independent significance” approach and copyright apportionment
 11 rely on the conjoint and econometric analyses, they should be stricken for that reason as well.

12 II. THE THIRD COCKBURN REPORT

13 Dr. Cockburn’s third report begins, as his second report did, with the negotiations Google
 14 and Sun conducted in early 2006 for a technology partnership to develop a mobile smartphone
 15 platform. As before, Dr. Cockburn uses as his monetary starting point Sun’s initial February
 16 2006 demand, which he calculates at **\$98.7 million**, rather than Sun’s final demand in April 2006
 17 of \$28 million. February 3, 2012 Cockburn Report (“Cockburn Rep.”) ¶¶ 5-6. He then performs
 18 the following adjustments:

- 19 • He adjusts the starting point upward by \$557.2 million to account for convoyed sales
 20 Sun projected to make as part of its partnership with Google, resulting in a subtotal of
 21 **\$655.9 million**. *Id.* ¶¶ 37-41.
 - 22 • Although Sun’s initial demand contained a cap on Sun’s ability to share in Google’s
 23 revenue from the partnership, he removes that cap to adjust for Sun’s loss of
 24 compatibility and control caused by Google’s development of an independent
 25 platform. This adjustment adds a further \$27.8 million, leaving the subtotal at **\$683.7**
 26 **million**. *Id.*
 - 27 • He then apportions the value of the patents and copyrights at issue in the suit as a
 28 percentage of the total. He uses two alternative apportionment methodologies—the
 “group and value” and the “independent significance” approaches. *Id.* ¶¶ 42-68.
- Under the **group and value** approach, Dr. Cockburn first adjusts downward by
 \$86.15 million to account for projected engineering expenses Sun would have
 incurred as part of a partnership with Google. *Id.* ¶ 48. He assumes that this
 \$86.15 million would have captured the value of (1) all copyrighted materials
 other than the APIs at issue, including source code and Java mobile class libraries;

and (2) all Sun engineering know-how and trade secrets. *Id.* ¶ 49. Next, he concludes that the JAVA trademark and Java brand was worth nothing to Google, and performs no further downward adjustment for that intellectual property. He similarly assigns no value to the fact that a partnership with Sun would have given Google access to relationships with OEMs and other Sun partners. *Id.* ¶ 50.

- This leaves him with a total of \$597.5 million, which he contends accounts for the value of (1) Sun's Java mobile patent portfolio; and (2) the asserted copyrighted APIs. *Id.* ¶ 51. Based on a qualitative analysis by Oracle engineers, and three studies regarding the distribution of value among patents generally, he concludes that the six patents-in-suit are worth somewhere between 10.2% and 32.7% of the total, or ***between \$69.5 million and \$223.7 million.*** *Id.* ¶ 5. Based on Dr. Shugan's conjoint analysis, which suggests that consumers value the availability of applications (the Android feature purportedly enabled by the copyrighted APIs) about half as much as speed (the Android feature allegedly enabled by the asserted patents), he sets the value of the copyrights at exactly half the value of the patents—between 5.1% and 16.4% of the total, or ***between \$34.7 million and \$111.9 million.*** *Id.* ¶¶ 6, 54.
- Under the *independent significance* approach, Dr. Cockburn evaluates the totality of the evidence as to the importance of certain performance features to Google and to consumers, and concludes that the patents are worth “at least” 25% of the total, or ***at least \$170.9 million.*** *Id.* ¶¶ 5, 60-68. Again relying on Dr. Shugan, Dr. Cockburn values the copyrights at exactly half the value of the patents, or “at least” 12.5% of the total, or ***at least \$85.5 million.*** *Id.* ¶¶ 6, 60-68.
- Dr. Cockburn then performs further downward adjustments to his alternative patent calculations to exclude damages for extraterritorial infringement, past damages for Sun's and Oracle's failure to mark its products, and damages for non-accused devices. The results are final patent-damages figures of ***\$17.7 million to \$57.1 million*** under the group and value approach and ***at least \$43.7 million*** under the independent significance approach. *Id.* ¶ 5.
- Accordingly, Dr. Cockburn's alternative total damages figures for both patent and copyright infringement are (1) ***between \$52.4 million and \$169 million*** under the group and value approach (assuming the Court requires all the deductions described above for extraterritorial infringement, marking, and non-accused devices); and (2) ***at least \$129.2 million*** under the independent significance approach.

III. ARGUMENT

A. Dr. Cockburn's “independent significance” approach to patent apportionment is based entirely on Dr. Cockburn's say-so and is a disguised resurrection of the “25 percent rule” that the Federal Circuit struck down in *Uniloc*.

Prior to the Federal Circuit's ruling last year in *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011), experts often used, and courts frequently approved, the so-called “25 percent rule,” which was “a tool that has been used to approximate the reasonable royalty rate that the manufacturer of a patented product would be willing to offer to pay to the patentee during a hypothetical negotiation.” *Id.* at 1312. Under the rule, courts would simply assume, as

1 a matter of rough justice, that hypothetical negotiators would agree to a royalty rate equal to 25
 2 percent of the licensor's expected profits for a product that incorporates the intellectual property
 3 at issue. *Id.* at 1312-13. In *Uniloc*, the Federal Circuit sounded the death knell for this sort of
 4 subjective approximation, concluding that the "25 percent rule of thumb is a fundamentally
 5 flawed tool for determining a baseline royalty rate in a hypothetical negotiation." *Id.* at 1315. It
 6 thus held that "[e]vidence relying on the 25 percent rule of thumb is thus inadmissible under
 7 *Daubert* and the Federal Rules of Evidence, because it fails to tie a reasonable royalty base to the
 8 facts of the case at issue." *Id.*

9 Unable to rely directly on the 25 percent rule or any similar rule of thumb, Dr. Cockburn
 10 surreptitiously resurrects it through what he describes as the "independent significance"
 11 approach. Cockburn Rep. ¶¶ 421-459. Under this approach, as he described it in his deposition,
 12 Dr. Cockburn [REDACTED]

13 [REDACTED]
 14 [REDACTED] Declaration of David Zimmer in Support of Google's Motion to Strike
 15 ("Zimmer Decl.") Ex. A (Cockburn Dep.) at 135:6, 137:17-20.

16 According to his report, the evidence Dr. Cockburn reviewed included contemporaneous
 17 documents regarding the importance and value to Google of key performance characteristics,
 18 contemporaneous documents regarding the availability of non-infringing alternatives, Oracle's
 19 benchmarking studies, the opinions of Oracle technical expert John Mitchell and Google
 20 technical expert Owen Astrachan, and the opinions of Oracle's engineers. Cockburn Rep. ¶ 421.
 21 Although Dr. Cockburn did not mention them at all in the "independent significance" approach
 22 section of his report, Dr. Cockburn stated in his deposition that [REDACTED]

23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED] Zimmer Decl. Ex. A (Cockburn Dep.) at 135:7-136:21.

28 In his report, Dr. Cockburn offers no explanation as to how he gets from this evidentiary

1 miscellany of data to his bottom-line 25% figure. In his deposition, Dr. Cockburn admitted that
2 he had essentially made up that number because it felt right to him:

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 *Id.* at 139:2-18. Incredibly, Dr. Cockburn also admitted his 25% number was just a floor, and he
13 might well assert an undisclosed higher number once he gets on the witness stand:

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 *Id.* at 142:7-143:3 (emphasis added). It gets worse—Dr. Cockburn also said that he might advise
24 the jury that the copyrighted APIs could constitute **100%** of the value of the 2006 partnership. *Id.*
25 at 166:12-20 [REDACTED]

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 Not only is Dr. Cockburn's bottom-line apportionment percentage under the independent
 4 significance approach entirely undefined, the only thing connecting that conclusion to its
 5 purported evidentiary basis is Dr. Cockburn's subjective judgment, which by definition cannot
 6 be replicated or verified by another expert. This is no different from the guesswork that used to
 7 underlie the 25 percent rule, before the Federal Circuit's ruling in *Uniloc*. The Court should not
 8 allow Dr. Cockburn to resurrect the 25 percent rule by [REDACTED]
 9 [REDACTED]

10 **B. Dr. Cockburn's "group and value" approach to patent apportionment is biased and**
 11 **based on inapposite studies of patent value.**

12 In conducting his "group and value" approach, Dr. Cockburn relied on Dr. Reinhold and
 13 four other Oracle engineers to review Sun's portfolio of 569 mobile Java-related patents. The
 14 four engineers on whom Dr. Reinhold relied had *all* been involved in analyzing patents as part of
 15 this litigation, and did not recuse themselves from evaluating any of the patents-in-suit on which
 16 they had worked. Zimmer Decl. Ex. H (Rose Dep.) at 79:14-81:23, 84:24-86:8; Zimmer Decl.
 17 Ex. I (Wong Dep.) at 83:15-85:21, 88:1-95:6, 132:18-133:11; Zimmer Decl. Ex. J (Kessler Dep.)
 18 at 68:5-71:11; Zimmer Decl. Ex. K (Plummer Dep.) at 32:22-38:25, 50:25-52:22. The engineers
 19 first divided the 569 patents into 22 technology groups. Cockburn Rep. ¶¶ 391-92. The
 20 engineers then identified four metrics for evaluating the usefulness of a technology group to a
 21 mobile smartphone platform—operating speed, startup speed, memory footprint, and security—
 22 and ranked the 22 groups according to the four metrics. Then they tallied up those rankings,
 23 with the result being an aggregate ranking of the usefulness of the 22 groups. Finally, they
 24 separately rated each individual patent on a scale of 1 to 3 in terms of the benefits each would
 25 allegedly provide to a smartphone platform. *Id.* ¶¶ 393-94. The rating of the 569 patents was
 26 done over just two days. *See, e.g.*, Zimmer Decl. Ex. J (Kessler Dep.) at 33:12-34:5. One
 27 engineer [REDACTED]
 28 [REDACTED]

Zimmer Decl. Ex. K

(Plummer Dep.) at 37:3-25. The rating was based solely on a spreadsheet including the title, abstract, inventors and issue or filing date. *See, e.g.,* Zimmer Decl. Ex. K (Plummer Dep.) at 32:13-21; Zimmer Decl. Ex. J (Kessler Dep.) at 40:6-41:21. It was therefore inevitable that the engineers would favor the patents they had already analyzed as part of this case. Christopher Plummer, one of the engineers, admitted he relied on his previous work in rating the patents:

[REDACTED]

Zimmer Decl. Ex. K (Plummer Dep.) at 101:25-102:14. The other engineers admitted having similar knowledge, but claimed it didn't influence them. *See, e.g.,* Zimmer Decl. Ex. I (Wong Dep.) at 94:25-96:2 [REDACTED]

[REDACTED] Zimmer Decl. Ex. H (Rose Dep.) at 84:6-13 [REDACTED]

[REDACTED]

Dr. Cockburn then synthesized these questionable group rankings and the patent ratings by isolating all the patents in the purportedly top three technology groups with a "1" rating. The result was a group of 22 patents that he asserted constitute the most valuable 4% of Sun's mobile Java portfolio. Cockburn Rep. ¶¶ 397, 408. This group of 22 patents included three of the patents-in-suit—the '720, '205, and '104. *Id.* ¶ 397.

But because the engineers' analysis was entirely qualitative, Dr. Cockburn next faced the challenge of translating these value comparisons into the hard numbers required for a damages

1 calculation. The Oracle engineers themselves confirm that they had no technical basis for
 2 translating their qualitative judgment into quantitative valuations. Dr. Reinhold confirmed that
 3 the engineers did no quantitative assessment, and that such an assessment would require
 4 significant and repeated performance testing of each patent's functionality. Zimmer Decl. Ex. B
 5 (Reinhold Dep.) at 40:8-12, 41:20-42:11, 43:12-25, 47:13-20. Even then, Dr. Reinhold testified,
 6 no quantitative assessment of all the various patents would be possible given that some patents
 7 were substitutes for, or complements to, others in the portfolio. *Id.* at 96:7-97:9; *id.* at 105 [REDACTED]

8 [REDACTED]
 9 [REDACTED]. In the end, although Dr. Reinhold believed that the patents
 10 in the top-ranked group were each more valuable than any of the patents in the second-ranked
 11 group, he could not offer even a guess as to the ranking among these top 22 patents. *Id.* Dr.
 12 Reinhold conveyed this opinion to Dr. Cockburn. Zimmer Decl. Ex. A (Cockburn Dep.) at 125.

13 Undeterred, Dr. Cockburn tries to bridge the gap between the engineers' vague judgments
 14 of quality and a quantitative damages calculation by relying on three surveys of patent value
 15 having nothing to do with the Sun portfolio at issue. Each of these surveys¹ conclude that the
 16 distribution of value among patents is highly skewed, with a handful of patents accounting for a
 17 large percentage of the value of all patents. *Id.* ¶ 405. Dr. Cockburn adopted the distributions of
 18 patent value described in these studies and concluded that the top 22 patents in Sun's portfolio
 19 are worth 67.9% to 91.9% of the overall value of the portfolio, with the six patents-in-suit being
 20 worth between 10.2% and 32.7% of the overall patent portfolio. *Id.* ¶¶ 408, 412.

21 The problem with this analysis is that there is no relationship between the Sun portfolio at
 22 issue in this case and the patents studied in the three surveys. As the Federal Circuit made clear
 23 in *Uniloc*, "[i]f the patentee fails to tie the theory to the facts of the case, the testimony must be
 24 excluded." 632 F.3d at 1315. Here, Dr. Cockburn's survey model is inapposite to the actual Sun

25
 26 ¹ The three studies are A. Gambardella, P. Giuri & M. Mariani, *The Value of European Patents -*
 27 *Evidence from a Survey of European Inventors*, Final Report of the PatVal EU Project, January
 28 2005, D. Harhoff, F. Scherer & K. Vopel, *Citations, family size, opposition and the value of*
patent rights, 32 Research Policy 1343, (September 2003), and J. A. Barney, *A Study of Patent*
Mortality Rates: Using Statistical Survival Analysis to Rate and Value Patent Assets, 30 AIPLA
Quarterly Journal, Vol. 30, No. 3, Summer 2002.

1 portfolio at issue here for the following reasons:

- 2 • The Sun portfolio here is owned by a single company. None of the studies
3 looked at single-owner portfolios at all. *See, e.g.,* Zimmer Decl. Ex. A
(Cockburn Dep.) at 94:15-95:7, 104:20-105:6. As Dr. Cockburn admitted
4 about one of the studies [REDACTED]
[REDACTED] *Id.* at 95:20-21.
- 5 • The Sun portfolio at issue here is confined to a relatively narrow technology
6 area: mobile smartphone platform software functionality. None of the studies
7 had any subject-matter limitation; each of them evaluated every type of patent
in every type of technology area under the sun. *See, e.g., id.* at 96:5-11,
100:24-101:7.
- 8 • The 569 patents in the Sun portfolio were selected deliberately for relevance
9 to this case by Oracle engineers who also worked on pre-litigation
infringement analyses of the patents-in-suit for Oracle. By contrast, the
10 patents evaluated in the studies were randomly selected.

11 Each of these critical differences means that the patent populations evaluated in the three
12 studies are likely to have different distributions of value than the Sun portfolio. Dr. Cockburn
13 offers nothing to support his assumption that the value distribution of industry- and company-
14 wide patents is the same as the value distribution of one software company's portfolio in a
15 specific technology area.

16 Further, two of the surveys in Dr. Cockburn's report—the PatVal and Harhoff studies—
17 looked only at European patents, and one of those two was confined to only German patents. All
18 569 Sun patents are U.S. patents. *Id.* at 95:8-12, 102:2-7. This is not a trivial difference. The
19 German study recognized that one of its conclusions would be “surprising” to those familiar with
20 U.S. patents. Zimmer Decl. Ex. C (Harhoff study) at 1355 (“Some of the mean values should be
21 surprising to readers familiar with citation indicators from the US patent system. As reported in
22 a previous paper (Harhoff et al., 1999), we find that the citation counts, both in the German and
23 the European system, are spectacularly low by USPTO standards.”). Dr. Cockburn again
24 provides no support for his assumption that the value distribution of European patents is the
25 same as that of U.S. patents, and the text of one of his source studies refutes that assumption.

26 The lone study in Dr. Cockburn's report that evaluated U.S. patents—the Barney study—
27 is inapposite because it calculated patent value according to whether the patentee had paid the
28 patent-renewal fees over the life of the patents. Zimmer Decl. Ex. A (Cockburn Dep.) at 105:14-

1 107:19. Dr. Cockburn did not attempt to tie this methodology to the Sun portfolio by examining
 2 whether Sun and Oracle had paid patent renewal fees for the 569 patents in the portfolio at issue.
 3 Assuming Sun and Oracle did so for all or nearly all 569 patents—and there is no evidence to the
 4 contrary—it would follow, using the logic of the Barney study, that each of those patents had an
 5 approximately equal value.

6 Despite the vast differences between the patents examined in these three studies and the
 7 569 Sun patents at issue in this case, Dr. Cockburn in his deposition [REDACTED]

8 [REDACTED]
 9 [REDACTED] *Id.* at 107:20-108:2. Instead,

10 Dr. Cockburn simply [REDACTED]

11 [REDACTED]
 12 [REDACTED] *Id.* at 99:11-18; *see also id.* at 100:20-23 [REDACTED]

13 [REDACTED]
 14 [REDACTED]. This type of *ipse dixit* link between external
 15 studies and the facts of this case is inadmissible under *Daubert*, as the Supreme Court made clear
 16 in *General Electric Co. v. Joiner*:

17 Trained experts commonly extrapolate from existing data. But
 18 nothing in either *Daubert* or the Federal Rules of Evidence
 19 requires a district court to admit opinion evidence that is connected
 20 to existing data only by the *ipse dixit* of the expert. A court may
 21 conclude that there is simply too great an analytical gap between
 22 the data and the opinion proffered.

23 522 U.S. 136, 146 (1997). In this case, the analytical gap between the three patent value studies
 24 and Dr. Cockburn's ultimate conclusions is cavernous. The Court should strike this analysis.

25 **C. Dr. Cockburn failed to apportion the full value of the copyrights that would have
 26 been included in the 2006 bundle.**

27 In addition to using two unreliable patent apportionment methodologies, Dr. Cockburn
 28 failed to make any attempt to value all of the copyrights that would have been part of the 2006
 intellectual property package. Indeed, Dr. Cockburn had no idea what Java-related copyrights
 Sun owned at the time of the hypothetical negotiation, let alone what they were worth.

The Court stated unequivocally in its January 9, 2012 Order that “[i]f the \$100 million in

1 2006 is used as the starting point . . . then a fair apportionment of the \$100 million as between
 2 the technology in suit and the remainder of the technology then offered must be made.” Jan. 9,
 3 2012 Order [Dkt. No. 685] at 8. In the patent context Dr. Cockburn at least made an attempt to
 4 follow the Court’s instructions by apportioning the patents included in the 2006 bundle between
 5 the patents in suit and the remainder of Sun’s Java-related patents. In the copyright context,
 6 however, Dr. Cockburn did not even attempt to undertake this analysis. Dr. Cockburn admitted
 7 in his deposition that he did not even know what Java-related copyrights Sun owned in 2006:

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

14 Zimmer Decl. Ex. A (Cockburn Dep.) at 153:17-154:3.

15 Without knowing what copyrighted material was at issue, it was of course impossible for
 16 Dr. Cockburn to apportion all of that copyrighted material between the 37 APIs at issue and the
 17 rest of the material. As Dr. Cockburn said in his deposition: [REDACTED]

18 [REDACTED]

19 [REDACTED] *Id.* at 161:9-12; *see also id.* at 161:22-162:2 [REDACTED]

20 [REDACTED]

21 [REDACTED]. Yet there is no reason to think

22 that there were not other copyrights being considered. Most obviously, the source code

23 underlying Sun’s implementation of the Java virtual machine is copyrighted, and at least would

24 have been a basis of any new virtual machine jointly developed by Sun and Google. *See id.* at

25 158:17-159:11 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 Because he made no effort to consider the scope of the copyrights at issue in the 2006

1 negotiations, Dr. Cockburn's analysis does not account for these or other copyrights that Google
2 would have obtained through the hypothetical negotiation.

3 Dr. Cockburn also made no systematic effort to measure the value of the millions of lines
4 of code in the API libraries that would have been part of the 2006 bundle. Unlike in the patent
5 context, Dr. Cockburn never had anyone from Oracle examine the code libraries to determine
6 their value in relation to the API specifications. Instead, he simply assumed that, whatever other
7 copyrights were on the table in the Sun-Google negotiations, their value would have been
8 subsumed in the operating and research-and-development expenses Sun projected it would incur
9 as part of its partnership with Google. Accordingly, Dr. Cockburn avoids any specific valuation
10 of those copyrighted materials at all. But Dr. Cockburn has no logical basis for using Sun's
11 projected future R&D *costs* (in developing new intellectual property in a mobile smartphone
12 platform partnership with Google) as a proxy for the *value* of Sun's then-existing intellectual
13 property (the copyrighted class libraries and source code). This analysis falls apart for at least
14 two reasons. First, Dr. Cockburn confuses cost with value. Consider the patents-in-suit—it
15 would have *cost* Sun nothing in terms of R&D costs to license those patents to Google in 2006,
16 because those inventions were already developed and patented. But Dr. Cockburn would
17 contend that the patents have significant *value* to Google. Second, Dr. Cockburn is again mixing
18 apples and oranges, by comparing two entirely distinct classes of intellectual property—Sun's
19 existing copyrighted materials that were the subject of the licensing negotiation, on the one hand,
20 and material that Sun might have developed during a partnership with Google, on the other.

21 Dr. Cockburn's conflation of projected cost with actual value, and his equal treatment of
22 past copyrighted works and different, future copyrighted works are both efforts to cover up the
23 fact that he has engaged in no rigorous evaluation of the individual values of the copyrights in
24 the 2006 licensing bundle. Indeed, as already discussed, he cannot even identify the components
25 of that bundle. His copyright apportionment analysis is unreliable and should be excluded.

26 **D. Dr. Cockburn failed to conduct a claim-by-claim analysis, and hence failed to**
27 **attribute any value to the unasserted claims.**

28 The court has repeatedly emphasized that Dr. Cockburn is required to calculate Oracle's

1 purported patent damages on a claim-by-claim basis. Jan. 9, 2012 Order [Dkt. No. 685] at 9-10.
 2 Yet Dr. Cockburn has still failed to do so, asserting that [REDACTED]
 3 [REDACTED]
 4 [REDACTED] Cockburn Rep. ¶ 497. Thus, as the Court ordered before, Dr. Cockburn
 5 should be “precluded from apportioning an asserted patent’s value among its claims at trial.”
 6 Jan. 9, 2012 Order [Dkt. No. 685] at 9.

7 More problematic, however, is that Dr. Cockburn fails to attribute any value to any of the
 8 unasserted claims of the patents-in-suit. In his deposition, Dr. Cockburn [REDACTED]
 9 [REDACTED]
 10 [REDACTED] Zimmer Decl. Ex. A (Cockburn Dep.) at 90:13-18.

11 This raises the distinct possibility that a portion of the value of some of the patents-in-suit may
 12 be located in claims that Google has not infringed. As the Court noted in its January 9 Order:
 13 “An infringer of one claim is compelled by law to pay for a license, via the hypothetical
 14 negotiation, for the specific invention represented by that claim but it is not required to pay for a
 15 license for the other specific inventions not infringed. Therefore, the hypothetical negotiation
 16 must be focused only on negotiating a compulsory license for each claim infringed, not for the
 17 entire patent.” Jan. 9, 2012 Order [Dkt No. 685] at 9. Indeed the idea that the unasserted claims
 18 had no value is belied by Oracle’s actions in this case. At one time, Oracle claimed that Google
 19 infringed 132 claims from 7 patents. *See* May 3, 2011 Order [Dkt. No. 131] at 1. Oracle has
 20 now limited its patent case to 26 claims from 6 patents. But Oracle must have had a Rule 11
 21 basis for asserting infringement of the now-abandoned claims by Google, so it cannot be heard to
 22 argue that those claims have no value to Google. Yet Dr. Cockburn has never tried to isolate the
 23 value of those claims—or other claims that Oracle never asserted—and deduct the value of the
 24 unasserted claims from the remaining value of the patents-in-suit. Yet again, he has violated the
 25 Court’s express instructions and overstated Oracle’s damages as a result.

26 **E. Dr. Shugan’s “conjoint” analysis is unreliable, methodologically flawed, and the**
 27 **results defy common sense.**

28 In addition to the flaws in his own analysis, Dr. Cockburn relies on a “conjoint” analysis

1 performed by another Oracle expert, Dr. Steven Shugan. Dr. Shugan's conjoint study purports to
 2 identify a limited number of smartphone features that consumers find important, then determine
 3 which of those features consumers value most. Then Dr. Shugan essentially converts the
 4 consumers' preference share into projected market shares—essentially, he concludes that, if 20%
 5 of consumers value application start time more than the other tested features, an increase in
 6 application start time on Android phones would mean a 20% drop in Android market share. This
 7 simplistic analysis may have some value as a marketing-research tool, but it is not an accepted
 8 method of calculating damages. As far as Google is aware, no court has ever approved the use of
 9 conjoint analyses in calculating damages.

10 Even setting aside the problems with conjoint analyses generally, the particular survey in
 11 this case had crippling methodological flaws, as is shown by the facially absurd responses it
 12 generated. Dr. Shugan's conjoint analysis is unreliable and would be unhelpful to the jury, and
 13 the Court should exclude it. Similarly, the parts of Dr. Cockburn's report relying on Dr.
 14 Shugan's analysis, primarily his "independent significance" and copyright apportionment
 15 analyses, *see* Cockburn Rep. ¶ 419; Zimmer Decl. Ex. A (Cockburn Dep.) at 135:12-15; 138:9-
 16 18; 140:10-142:3, also should be excluded.

17 **1. Conjoint analysis is not an accepted basis for calculating damages.**

18 Conjoint analysis is a marketing-research tool, not an accepted method of calculating
 19 damages in litigation. Calculation of reasonable-royalty damages in a patent case "requires
 20 sound economic and factual predicates." *Riles v. Shell Exploration and Prod. Co.*, 298 F.3d
 21 1302, 1311 (Fed. Cir. 2002). Whatever its value may be to marketing research, conjoint analyses
 22 like Dr. Shugan's simply lack the reliability required to prove damages with the "reasonable
 23 certainty" required in litigation. *See id.*; N.D. CAL. MODEL PATENT JURY INSTRUCTION NO. 5.1.

24 Neither Dr. Shugan nor Dr. Cockburn cite to a single instance where a court in any
 25 jurisdiction has allowed the parties to rely on "conjoint" analyses to prove damages. Indeed, in
 26 one of the few reported decisions to discuss conjoint analyses, the Second Circuit reversed a trial
 27 court decision that relied on conjoint analysis to grant a class certification motion under FED. R.
 28 CIV. P. 23(b). *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008), *rev'ing sub*

1 *nom Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1056 (E.D.N.Y. 2006). The
 2 plaintiffs in *McLaughlin* offered a conjoint survey to establish that they bought “light” cigarettes
 3 because of defendants’ misrepresentations that those cigarettes were healthier than “full-
 4 flavored” cigarettes. *Schwab*, 449 F. Supp. 2d at 1167. According to plaintiffs’ conjoint expert,
 5 90.1% of class members considered “health concerns” as a factor in purchasing light cigarettes.
 6 *Id.* at 1048. The trial court cited plaintiffs’ conjoint analysis in finding class-wide reliance, and
 7 the court also noted that the conjoint analysis would “probably be critical in estimation of
 8 damages.” *Id.* at 1126, 1147, 1169. The trial court refused to exclude the conjoint analysis, and
 9 certified a nation-wide class of “light” smokers. *Id.* at 1170, 1278.

10 The Second Circuit reversed. The court found that the conjoint analysis was insufficient
 11 to establish reliance because it failed to take account of the myriad other factors that may have
 12 influenced class-members’ decision to buy light cigarettes—*e.g.*, taste or “personal style.” *Id.* at
 13 223. The court sharply criticized the use of conjoint analysis to prove reliance, stating:

14 Plaintiffs’ expert, Dr. John R. Hauser, claimed that 90.1% of those
 15 who smoked Lights chose to do so because of Lights’ alleged
 16 health benefits. But Dr. Hauser came to this conclusion on the
 17 basis of a method that determined whether, *all things being equal*,
consumers prefer a safer cigarette to a less safe cigarette. And as
 plaintiffs conceded at oral argument, *no one who understood this*
question would prefer a more dangerous product to a safer one.

18 *Id.* at 225 n.6 (internal citations omitted) (emphases added). Accordingly, the Second Circuit
 19 concluded that plaintiffs had failed to establish damages with ““sufficient precision to allow a
 20 jury award.”” *Id.* at 232 (quoting and rejecting the district court’s conclusion as to damages).

21 *McLaughlin* illustrates the limitations of conjoint analysis. Conjoint analysis measures
 22 consumer preference for product features; it does not capture how consumers actually behave
 23 when purchasing a product. Consumers’ stated preference for a given feature may be one of
 24 many factors a company considers in designing or launching a new product, but they are not a
 25 proxy for market share. The dearth of opinions discussing use of conjoint analysis in litigation
 26 further suggests that conjoint studies cannot provide the “reasonable certainty” needed to support
 27 a multi-million dollar damages claim. *See* July 22, 2011 Order [Dkt. No. 230] at 12 (striking Dr.
 28 Cockburn’s reliance on the Nash bargaining solution in part because it “has never been approved

1 by a judge to calculate reasonable royalties in litigation, at least in the face of objection. This is
2 despite the fact that for decades it has been lurking in the field of economics.”).

3 **2. The conjoint survey’s methodology was flawed and unreliable.**

4 Even assuming that conjoint analysis is reliable enough for damages calculations—and it
5 is not—Dr. Shugan’s survey in this case was methodologically flawed for at least two reasons.
6 First, Dr. Shugan’s selection of features was driven by the litigation, and the choice profiles he
7 created do not approximate real-world purchase conditions. Second, as Dr. Shugan himself
8 concedes, the survey violated the fundamental premise of conjoint analysis: that respondents are
9 able to hold constant all product features other than those tested by the survey.

10 **a. The design of Dr. Shugan’s conjoint survey.**

11 Dr. Shugan used a web-based survey to measure the relative importance to consumers of
12 seven smartphone features: application multitasking, application startup time, availability of
13 third-party applications, brand, price, screen size, and voice command capabilities. Shugan Rep.
14 App. D at 5. The survey asked respondents to choose between side-by-side comparisons of
15 different smartphone “profiles.” Each profile was a written list of varying levels of functionality
16 in each of the seven features—*e.g.*, one phone might be described as (1) an Android phone with
17 (2) a 4.5-inch screen that (3) can run five apps at once (4) with a startup time of 2 seconds, (5)
18 300,000 available apps, and (6) voice dialing and texting (7) available for a sale price of \$200.
19 Respondents were instructed to assume that every feature other than the seven listed features was
20 the same for each profile. Shugan Rep. App. E at E12-E20.2.

21 Dr. Shugan used respondents’ selections to rank and measure the relative importance of
22 the seven features to consumers. He then plugged these ranked values—referred to in conjoint
23 parlance as “partworths”—into a statistical software program in order to assess general consumer
24 preference for an Android phone lacking the application volume, startup time, and multitasking
25 capabilities allegedly provided by the patents- and copyrights-in-suit.

26 **b. The conjoint survey’s fatal methodological flaws.**

27 *First*, Dr. Shugan’s selection of allegedly important smartphone features for the conjoint
28 survey was not driven, as one would expect, by which features are actually valuable to

1 consumers. Instead, Dr. Shugan selected features that were important to Oracle's needs in this
 2 litigation. He included just seven features in his smartphone "profiles," and five of those seven
 3 features—all features other than brand and price—were spoon-fed to him by either Dr. Cockburn
 4 or the Analysis Group, Dr. Cockburn's consulting group. Zimmer Decl. Ex. D (Shugan Dep.) at
 5 29:22-30:11. Indeed, Dr. Shugan's own "market research" identifies 36 other features that real-
 6 world consumers actually said they would (or have) considered in purchasing a smartphone,
 7 including such obviously important features as the associated cellular network, battery life, and
 8 keyboard type and layout. *See* Shugan Report Ex. 1. Dr. Shugan made no effort, prior to
 9 administering his seven-feature survey, to determine whether any of the 36 other features he
 10 chose to omit were actually more important to consumers than the seven he actually tested.
 11 Instead, Dr. Shugan's survey ignores those 36 features, and asks consumers to assume that any
 12 feature not specifically listed among the seven tested features is the same for all phones. But all
 13 phones are not the same in the real world. Forcing consumers to operate under this assumption
 14 undermines the survey's ability to predict real-world behavior. As Judge Posner noted in a
 15 recent hearing in the *Apple v. Motorola* case, responding to a suggestion from counsel for Apple
 16 that Apple could measure the value of a patent through a consumer survey:

17 I'm not going to ask consumers how they like it. That is a totally –
 18 that is a totally fraudulent way of determining – I mean, look, you
 19 go out and start asking consumers, oh, this device had X and meant
 20 that [a certain feature was enabled,] would you pay more for that?
 Of course, they'll say yes, right, because you're focusing them on
 some feature.

21 Zimmer Decl. Ex. E (Transcript of Jan. 23, 2012 Hearing, *Apple, Inc. v. Motorola, Inc.*, No. 11 C
 22 8540 (N.D. Ill.)) at 22-23; *see also id.* at 23 ("I'm not going to have competing experts talking
 23 about their marketing surveys. I regard that evidence as totally worthless."). This flaw in
 24 conjoint analysis renders the results unfit for the demanding task of calculating actual damages in
 25 a multi-million dollar litigation.

26 *Second*, Dr. Shugan's study includes the same error this Court recognized in striking Dr.
 27 Cockburn's second report last month—it measures the value consumers place on certain phone
 28 *features* as a whole, rather than the incremental benefit to those features allegedly enabled by the

1 *technology* at issue. Courts have struck similar consumer surveys for this reason. *See Fractus*,
 2 *S.A. v. Samsung Elecs. Co.*, No. 6:09-cv-0203, Dkt. No. 896 (E.D. Tex. Apr 29, 2011) (excluding
 3 consumer survey data, that “do[es] not measure the value of Plaintiff’s technology, but merely
 4 measure[s] the perceived consumer value of cell phones with any internal antennas” and
 5 concluding that “[s]urvey evidence purportedly demonstrating the value of internal antennas not
 6 tied directly to Plaintiff’s technology confuses the issues and must be excluded”).

7 *Third*, the results of the survey clearly show that respondents were *not* in fact holding
 8 constant all unnamed features. Dr. Shugan’s failure to control for this fact is fatal, because the
 9 ability of conjoint analysis to predict consumer preference for a specified feature requires the
 10 consumer to ignore potential differences in any unspecified features. Dr. Shugan explained this
 11 fundamental presumption of conjoint analysis in his deposition:

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 Zimmer Decl. Ex. D (Shugan Dep.) at 38:2-25 (emphases added).

18 But the proof is in the pudding—and here, almost one quarter of all respondents claimed
 19 that they would prefer a smartphone costing \$200 to *a putatively identical smartphone* costing
 20 \$100. Zimmer Dec. Ex. F (Oct. 24, 2011 Leonard Rep.) at 114.² No rational person, much less
 21 24% of all rational people, would prefer to pay \$200 for a phone they could have for \$100. The
 22 explanation for this apparently nonsensical result is obvious—survey respondents were not
 23 holding non-specified features constant. Instead, as Dr. Shugan himself conceded in his reply
 24 report, his respondents did the opposite:

25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 ² Similarly, 26% of the respondents claimed to prefer a phone with an application startup time of
 2 seconds to a phone with startup time of 0.2 seconds. *Id.* at 115.

1 [REDACTED]
2 Shugan Reply Rep. at 17-18.

3 Dr. Shugan makes no effort to explain this result other than to say that we cannot assume
4 that consumers behave rationally because the purpose of the conjoint analysis was to study
5 consumer behavior. *Id.* at 17-18. This circular logic ignores the premise of *Daubert* and the
6 Federal Rules of Evidence. The point is not that Dr. Shugan should have excluded a full quarter
7 of his respondents as “irrational,” but rather that the conclusion that 24% of survey respondents
8 gave answers that made no sense proves that the survey design is fundamentally flawed. Courts
9 routinely recognize that a “common sense” understanding of real-world consumer behavior is an
10 important check against the reliability of surveys that produce preposterous results. *See Johnson*
11 *Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp.*, 103 F. Supp. 2d 268, 286 (S.D.N.Y. 2000)
12 (striking a survey that, “despite its dazzling sheen of erudition and meticulous methodology,
13 reaches a result which any average person could readily recognize as preposterous”). The results
14 of Dr. Shugan’s conjoint analysis are equally preposterous—not because consumers are irrational
15 in the real world, but because of glaring flaws in the design of the survey.

16 Even if conjoint analysis was a recognized and appropriate methodology for calculating
17 damages in litigation, which it is not and never has been, Dr. Shugan has failed to design a
18 conjoint survey that approximates real-world purchase conditions, and further created a survey
19 with such fundamental methodological flaws that it has returned nonsensical results. His survey
20 is too unreliable to be the basis of a multi-million dollar damages claim. Dr. Shugan’s report—
21 and Dr. Cockburn’s reliance upon that report—should be excluded under *Daubert*.

22 **F. Dr. Cockburn’s econometric analysis and calculation of market share are based on**
23 **inapplicable data and unrealistic assumptions.**

24 Dr. Cockburn’s econometric analysis purports to quantify consumer preferences for some
25 smartphone features over others, but it draws its data not from the sales prices of mobile phone
26 carriers who sell the vast majority of mobile phones in the United States, but rather from sales
27 data for largely second-hand phones on the eBay auction website. This error is compounded by
28 two unrealistic assumptions that Dr. Cockburn makes in converting his econometric analysis to

1 an estimate of market share in a world in which Google had released a slower version of
 2 Android, both of which inflate Oracle's damages. The Court should exclude this analysis.

3 **1. Overview of Dr. Cockburn's econometric analysis and market share**
 4 **calculations.**

5 Dr. Cockburn began with data he acquired of auctions on eBay for mostly second-hand
 6 smartphones. This data included, for each auction, both (a) the maximum price each bidder
 7 would have been willing to pay for the phone, which he deemed to be the consumer's
 8 "willingness to pay," and (b) the price for which the phone actually sold. Cockburn Rep. App. C
 9 ¶ 13. Collecting consumers' willingness to pay is possible because eBay bidders are allowed to
 10 enter their maximum bid, and the computer will only bid the amount necessary to win the
 11 auction. *Id.* ¶ 5. Dr. Cockburn also collected data from other sources about the attributes of each
 12 phone being auctioned, such as battery life, storage space, and presence of a camera. *Id.* ¶ 25.

13 Based on this data, Dr. Cockburn conducted a regression analysis to attempt to predict the
 14 impact on a consumer's willingness to pay for a given phone from a change in the phone's
 15 features. *Id.* ¶¶ 29-30. The most important feature was the phone's "Linpack benchmark,"
 16 which is one way of measuring a phone's operating speed. *Id.* ¶¶ 26-27. Oracle's engineers
 17 attempted to measure the impact the patents-in-suit had on smartphone performance by
 18 measuring the change in the Linpack benchmark when the patents were disabled. *Id.* ¶ 37.

19 Dr. Cockburn then attempted to convert his regression results into a calculation of
 20 smartphone market shares in the world in which Google released a slower version of Android.
 21 To make that calculation, Dr. Cockburn looked only at eBay bidders who placed bids on multiple
 22 smartphone models. *Id.* ¶ 39. For each of these bidders, Dr. Cockburn measured the bidder's so-
 23 called "consumer surplus" for each phone on which each bidder bid. *Id.* Consumer surplus is
 24 measured by calculating the difference between the consumer's willingness to pay for each
 25 phone (*i.e.* the consumer's maximum bid on eBay) and the price at which each phone sold. *Id.*
 26 n.25. Dr. Cockburn then used his regression results—specifically the coefficient on the Linpack
 27 benchmark that predicts the impact of a change in the Linpack benchmark on the consumer's
 28 willingness to pay—to estimate what each consumer's willingness to pay would have been for

1 the slower version of Android. *Id.* ¶ 41. Dr. Cockburn then measured each bidder's adjusted
2 consumer surplus for the Android phones. *Id.*

3 Dr. Cockburn concluded that if the bidder's adjusted Android consumer surplus remained
4 higher than the consumer surplus for non-Android phones, that bidder would still buy the
5 Android phone. If the adjusted Android consumer surplus became lower for the Android phone
6 than for the non-Android phone, then the bidder would buy the non-Android phone. And if all
7 consumer surpluses were negative—*i.e.* if the consumer's willingness to pay for non-Android
8 phones and adjusted Android willingness to pay are all lower than the price at which the phones
9 eventually sold—then the consumer would not buy a smartphone at all. *Id.* Based on his
10 determination of what each consumer would have done if Google had released a slower version
11 of Android, Dr. Cockburn estimated what portion of consumers who in reality bought an
12 Android phone would have switched to some other phone, or no phone at all, then estimated the
13 effect of those lost sales on Google's Android revenue. *See id.* App. D.

14 **2. Dr. Cockburn's econometric analysis is based on unrepresentative data.**

15 Dr. Cockburn incorrectly and without any support assumes that the data for smartphone
16 purchases on eBay is representative of the entire market for smartphones. Courts strike expert
17 testimony when it is based on unrepresentative and unreliable data. *See, e.g., Johnson Elec.*, 103
18 F. Supp. 2d at 283 (“[E]ven where an expert's methodology is reliable, if the analysis is not
19 based upon relevant and reliable data, the expert's opinion will be inadmissible.” (citing *Joiner*,
20 522 U.S. at 146)).

21 The vast majority of cell phones in the United States are sold new, as part of two-year
22 agreements with cell phone carriers like Verizon or AT&T. Dr. Cockburn makes no effort to
23 show that people buying unlocked, second-hand phones on eBay have the same consumer
24 preferences as consumers buying new cell phones as part of a two-year service agreement. Dr.
25 Cockburn never explains why he did not attempt to obtain data that measures how most
26 Americans purchase cell phones, nor did he make any argument as to why the Court or the jury
27 should assume that eBay customers' consumer preferences are representative of the general
28 population. As the *Johnson Electric* court noted in striking an expert's report, although “[i]t can

1 be appropriate to utilize market reconstruction to prove damages, particularly in patent cases ...
 2 if [plaintiff] wishes to reconstruct the micro-motor market, that reconstruction must be grounded
 3 on the *most relevant and reliable data available*.” *Johnson Elec.*, 103 F. Supp. 2d at 286
 4 (emphasis added). By contrast, “speculative economic analysis must be rejected.” *Id.* Here,
 5 instead of using data from phone carriers, the way nearly all American consumers purchase cell
 6 phones, Dr. Cockburn took a shortcut by using non-representative eBay data that he makes no
 7 effort to connect to the actual market for smartphones. *Daubert* does not allow such shortcuts.

8 **3. Dr. Cockburn’s calculation of market share is based on unreasonable**
 9 **assumptions about price and consumer choice.**

10 At least as problematic as Dr. Cockburn’s econometric analysis, if not more, is his effort
 11 to translate that econometric analysis into an estimate for what smartphone market share would
 12 have been had Google released a slower version of Android. Dr. Cockburn’s translation into
 13 market share is based on two unrealistic assumptions that significantly inflate Oracle’s damages.
 14 These calculations must be excluded as unreliable. *See Boucher v. U.S. Suzuki Motor Corp.*, 73
 15 F.3d 18, 21 (2d Cir. 1996) (“[A]n expert’s testimony should be excluded as speculative if it is
 16 based on unrealistic assumptions.”); *Medical Instr. & Diagnostics Corp. v. Elekta AB*, No. 397-
 17 CV-00271, 2001 WL 36151641 (S.D. Cal. Dec. 12, 2001); *see also* July 22, 2011 Order [Dkt.
 18 No. 230] at 13 (Dr. Cockburn’s use of the Nash bargaining solution “would invite a miscarriage
 19 of justice by clothing a fifty-percent assumption in an impenetrable facade of mathematics”).

20 *First*, Dr. Cockburn’s market share calculation is based on the incorrect assumption that
 21 although every consumer would be willing to pay less for a slower version of Android, the price
 22 of Android would remain constant. This assumption leads Dr. Cockburn to significantly
 23 overestimate the number of eBay users who would have chosen not to purchase an Android
 24 phone if Google had released a slower version of Android, which in turn leads Dr. Cockburn to
 25 overestimate Oracle’s damages. As described above, Dr. Cockburn began with each bidder’s
 26 actual consumer surplus, measured as the difference between the price that the consumer bid for
 27 the phone, and the price at which the phone sold. He then used his regression results to calculate
 28 the maximum price each consumer would have bid for the slower version of Android—a number

1 that is smaller than the maximum price the consumer actually bid. Dr. Cockburn then took this
 2 *adjusted* maximum bid and compared it to the *unadjusted* price at which the phone actually sold
 3 to get his adjusted consumer surplus.

4 In doing so, Dr. Cockburn assumed that if Google released this slow version of Android,
 5 the price for which it would sell on eBay would be *exactly* the same price as the current version
 6 of Android. Zimmer Decl. Ex. G (Oct. 17, 2011 Cockburn Dep.) at 106 [REDACTED]

7 [REDACTED] This
 8 assumption makes no sense. Plainly the eBay price of a slower Android would be lower because
 9 an eBay sales price is determined by the second highest bidder, whose willingness to pay would
 10 also decrease. But in measuring the adjusted consumer surplus of a given bidder, Dr. Cockburn
 11 adjusts the willingness to pay of that bidder while assuming that price—and hence all other
 12 bidders' willingness to pay—would be the same as under the current, much faster version of
 13 Android. If Dr. Cockburn accounted for the fact that other bidders' willingness to pay would
 14 have similarly decreased in the world in which Google released a slower Android, he would have
 15 found that far fewer people (if any) would have diverted from Android to other platforms.

16 *Second*, Dr. Cockburn assumed each bidder's choices are limited to the specific phones
 17 on which the bidder bid during a ten-day window. This unrealistic assumption again leads Dr.
 18 Cockburn to overestimate the number of people who would not have bought the slower Android
 19 phones. In Dr. Cockburn's artificial world, if a bidder bid on two phones—for example, an
 20 Android phone and an iPhone—Dr. Cockburn assumes that those are the *only* two phones that
 21 consumer would consider purchasing. If that bidder lost the iPhone auction, and also would have
 22 lost the Android auction based on his or her adjusted willingness to pay, Dr. Cockburn concludes
 23 that that bidder would *not acquire a smartphone at all*. Dr. Cockburn ignores the possibility
 24 that the bidder might have gone to a Verizon or AT&T store to buy a phone, or waited two
 25 weeks and then returned to eBay to try again. This incorrect assumption leads to bizarre results.
 26 According to Dr. Cockburn, out of all the people who bought Android phones in 2010, *over 15%*
 27 of all the people who bought Android phones in 2010 would not have acquired a smartphone *at*
 28 *all* had Google released Android without the patents in suit. Cockburn Rep. Ex. C-9 (purporting

1 to show that of the 55.4% of actual Android purchasers who would not have purchased an
 2 Android in the but-for world, 27.4% would have bought no smartphone).³ This unrealistic result
 3 significantly inflates Oracle's damages. According to Dr. Cockburn, Google's revenues decrease
 4 somewhat when consumers switch from Android to other platforms because Google still collects
 5 downstream revenue, but Google's revenues from consumers who do not purchase smartphones
 6 at all go all the way to zero. Cockburn Rep. App. D ¶¶ 11-23. Under Dr. Cockburn's model,
 7 Google's revenues take a much bigger hit when a consumer decides not to buy a smartphone at
 8 all, as compared to when a consumer simply switches to another brand (as would logically be the
 9 case in the real world).

10 Both of these erroneous assumptions have an obvious inflationary effect on Oracle's
 11 damages numbers. When Dr. Cockburn's errors are corrected, the results fundamentally
 12 undermine his market share calculations and reveal them to be "unhelpful to the trier of fact and
 13 inadmissible at trial." *Medical Instr.*, 2001 WL 36151641.

14 IV. CONCLUSION

15 For all the reasons set forth above, this Court should strike Dr. Cockburn's third damages
 16 report, and further exclude Dr. Cockburn's econometric analysis and Dr. Shugan's conjoint
 17 analysis under *Daubert* and its progeny.

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 19 Dated: February 17, 2012

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 26 ³ Notably, Dr. Shugan's conjoint analysis does not even allow for the possibility that an Android
 27 user would have purchased no phone if Google released a slower version of Android.
 28